

**Charles Z. Silverman**  
**San Juan County Deputy Prosecutor**  
**350 Court Street, 1<sup>st</sup> Floor**  
**Friday Harbor, WA 98250**  
**(360) 378-4101 (Telephone); (360) 378-3180 (Fax)**

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## **A DISCUSSION OF THE NEW MARIJUANA LAW AND RELATED LEGAL ISSUES**

### **INTRODUCTION**

To understand the scope of your authority under the new marijuana law (Initiative 502) we must first go back to basics. Since the new law includes both civil infractions and crimes, we will explore the procedural laws that apply to each.

There are four major areas of concern:

1. Stopping or detaining the person:
  - a. Can you conduct a *Terry* investigative stop?
  - b. Can you detain a person to issue a criminal citation or a notice of civil infraction?
  - c. Can you arrest the person?
2. Can you search the person for evidence of the offense?
3. Can you seize an item related to the underlying infraction? [e.g. the open container of alcohol, the marijuana cigarette]

Keep in mind that constitutional protections arise when a person is seized or his right of privacy is intruded upon. As to interference with the liberty of persons, we will examine the gamut of actions that start with contacts that do not constitute a seizure, move on to *Terry* investigative stops that require *reasonable suspicion*, and then to detentions to cite/arrest, which require *probable cause*. As to searches, we will discuss circumstances where you may search of evidence.

## STOPPING AND DETAINING

We will first review your authority for contacting, detaining, or arresting a person.

1. Officer-citizen encounter
2. *Terry* investigation stop
3. Detention on probable cause to believe an infraction has been committed [in the officer's presence or, in limited circumstances, outside of his presence]
4. Arrest

The constitution protects citizens from being unlawfully seized by the government. A person is "seized" when a reasonable person, under the totality of the circumstances, would not feel free to either (1) leave or (2) decline the officer's requests, due to an officer's use of force or display of authority. Whether a reasonable person would feel free to leave is not based on the citizen's behavior, but rather by objectively looking at the law enforcement officer's actions. Coercive conduct can be established by a single act, or by the cumulative effect of a series of acts or conditions: the fact that you are wearing a uniform, you are armed, and/or you carry a taser, and/or there are multiple officers present, and/or your tone of voice is demanding, and/or you ask the person to get out of a car, etc.

### A. Contacting and Stopping the Person

#### 1. Officer-Citizen Encounter

Your first tool: The **Officer-Citizen Encounter**: Always keep in mind that nothing prohibits you from attempting to conduct an officer-citizen "encounter" to investigate a crime or an infraction. You may approach a person on the street without having reasonable suspicion or probable cause of unlawful activity, if you do not seize him.

A police-citizen encounter which involves no restraint on the citizen's liberty, and which is characterized by an officer seeking the citizen's voluntary cooperation through noncoercive questioning, is not a seizure within the meaning of the Fourth Amendment.

In an officer-citizen encounter you do not "seize" the person -- that is because you do nothing that would lead a reasonable person under the circumstances to believe he is not free to cut off the conversation and leave. Your tone of voice is friendly, you don't block the person, you don't have multiple officers around, you do not touch or gesture towards your weapons, you may even tell the person that he is free not to talk to you and to leave at any time. You ensure that there is nothing about the circumstances of the encounter that would cause a reasonable person to believe he was "seized".

Some factors that may elevate an officer-citizen encounter to a seizure:

1. The use of language or tone of voice indicating that compliance with your request might be compelled;
2. The use of coercive language to initiate the contact [i.e. "Wait here" or "Come over here" or "Stop for a second", as opposed to: Gentlemen, I'd like to speak with you, could you come to my car?"]
3. Insisting upon responses;
4. Not allowing a person to leave;
5. Retaining control of the person's identification card or license;
6. Placing the person's possessions in a patrol car or out of his reach;
7. Asking for permission to frisk or search;
8. Touching the person;
9. Having your emergency lights on.

## 2. *Terry* Investigative Stop

Your second tool: ***Terry* investigative stop:**

A *Terry* stop is an investigative tool. It is used by officers who only have *reasonable suspicion* to believe a person is or has committed an offense, in order to investigate the circumstances and determine whether there is *probable cause* to believe an offense has been committed.

To justify a *Terry* stop under the Fourth Amendment and art.I, § 7, a police officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." The level of articulable suspicion necessary to support an investigative detention is "a substantial possibility that criminal conduct has occurred or is about to occur."

Keep in mind that a *Terry* investigative stop does not authorize a search for evidence of a crime. It merely allows you to briefly detain the person to investigate the offense. However, it does authorize officers to make a brief, nonintrusive search for weapons if, after a lawful *Terry* stop, a reasonable safety concern exists to justify the protective frisk for weapons, so long as the search goes no further than necessary for protective purposes.

The scope of the investigatory stop is determined by considering (1) the purpose of the stop [including the seriousness of the offense]; (2) the amount of physical intrusion on the suspect's liberty, and (3) the length of time of the seizure. Your actions are limited to those necessary to effect the stop in a safe and effective manner, to diligently pursue a means of investigation that would likely confirm or dispel your suspicions by the least intrusive means reasonably available to effectuate the purpose of the detention, and must last no longer than is necessary to verify or dispel your suspicion. The detention must be promptly terminated when you have facts sufficient to exclude the detainee from suspicion.

A person who refuses to identify himself during a *Terry* stop has not committed a crime. However, a person who provides a false name or false identifying information may be arrested for the crime of making a false or misleading statement to a public servant.

The *Terry* stop is a good investigative tool. But we must ask the question: For what kind of offenses are you empowered to conduct a *Terry* investigation stop?

**i. *Terry* investigation stops are limited to (1) crimes, and (2) traffic infractions<sup>1</sup>.**

Within the category of “traffic infractions”, there are further limitations: *Terry* stops may not be used to investigate parking infractions, pedestrian violations, or solely to investigate those traffic infractions whose enforcement the legislature has deemed to be “secondary actions” [i.e. those that can only be enforced in the course of a stop for other traffic infractions, such as Failure to Securely Attach Sound System Components, RCW 46.37.680(2), and most Intermediate license infractions under RCW 46.20.075]

You all understand how *Terry* investigation stops apply to criminal offenses, so we will not discuss that further here. However, it is crucial that you keep in mind the following: Since persons 21 years or older may possess small amounts of marijuana, the mere fact that a non-driver smells of marijuana, or you happen to observe that an adult has marijuana in his pocket or a bong in his backpack, does not provide probable cause to believe he has committed a crime.

**You have to treat marijuana just like you treat alcohol. It is important to make this change or you are going to get into trouble.**

**ii. Traffic infractions:**

We need to carefully explore the application and scope of *Terry* investigative stops for traffic infractions.

While our courts have held that *Terry* investigative stops are allowed for traffic infractions, we should keep in mind the statutory limitations placed upon officers detaining a person for a traffic infraction:

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<sup>1</sup> Our State Supreme Court, in *State v. Duncan*, 146 Wn.2d 166 (2002) and in *State v. Day*, 161 Wn.2d 889 (2007), has said that the exigency created by the ready mobility of vehicles and governmental interests in ensuring safe travel justify the use of *Terry* stops to investigate traffic infractions. Because this statement is merely dicta, I would not be surprised to see the court change its position in the future and either hold that *Terry* stops don’t apply to traffic infractions, or limit the scope of *Terry* stops for traffic infractions to the statutory power to detain the person for a reasonable period of time necessary to establish identity, check for outstanding warrants, and check the status of the person’s license, insurance, and registration. However, for now we will assume that the court meant what it said: *Terry* stops apply to most traffic infractions as discussed below]

***Whenever any person is stopped for a traffic infraction, the officer may detain that person for a reasonable period of time necessary to [1] identify the person, [2] check for outstanding warrants, [3] check the status of the person's license[], insurance identification card, and the vehicle's registration, and [4] complete and issue a notice of traffic infraction.***

RCW 46.61.021(2)

Another statute, RCW 46.64.015, applies to both traffic crimes and infractions and also reminds us that, except for those situations where you have probable cause to believe the suspect has committed a crime for which he may be placed in custodial arrest under RCW 10.31.100, detention arising from an “arrest” [which, for infractions, I interpret to mean mere “detention”] may not exceed the time period reasonably necessary to issue and serve the citation.

***Whenever any person is arrested for any violation of the traffic laws or regulations which is punishable as a misdemeanor or by imposition of a fine, the arresting officer may serve upon him or her a traffic citation and notice to appear in court. Such citation and notice shall conform to the requirements of RCW 46.64.010, and in addition, shall include spaces for the name and address of the person arrested, the license number of the vehicle involved, the driver's license number of such person, if any, the offense or violation charged, and the time and place where such person shall appear in court. Such spaces shall be filled with the appropriate information by the arresting officer. An officer may not serve or issue any traffic citation or notice for any offense or violation except either when the offense or violation is committed in his or her presence or when a person may be arrested pursuant to RCW 10.31.100, as now or hereafter amended. The detention arising from an arrest under this section may not be for a period of time longer than is reasonably necessary to issue and serve a citation and notice, except that the time limitation does not apply under any of the following circumstances:***

***(1) Where the arresting officer has probable cause to believe that the arrested person has committed any of the offenses enumerated in RCW 10.31.100(3);***

***(2) When the arrested person is a nonresident and is being detained for a hearing under RCW 46.64.035.***

There are probably two reasons for these limitations: (1) the conduct underlying an infraction is usually not dangerous, and (2) recognition that, for most infractions, by the time you have observed the violation and detained the person and examined his ID, all evidence necessary to prosecute the infraction have been obtained.

Thus, when we are dealing with traffic infractions:

1. You can conduct a *Terry* stop based on *reasonable suspicion* in order to investigate whether a person has committed a traffic infraction:

(a) in your presence, or

(b) outside of your presence : (1) when you are acting upon the request of a law enforcement officer in whose presence the traffic infraction was committed; (2)

when your on-scene investigation of a motor vehicle accident provides probable cause to believe that the driver of a motor vehicle involved in the collision has committed a traffic infraction; (3) when the infraction is detected through the use of a photo enforcement system under RCW 46.63.160; (4) when the infraction is detected through the use of an automated school bus safety camera under RCW 46.63.180; or (5) when the infraction is detected through the use of an automated traffic safety camera under RCW 46.63.170. RCW 46.63.030. [See RCW 46.63.030(1)].

2. Since it is only an infraction, your *Terry* investigative stop should be briefer than it would be for a crime. While you have leeway to investigate the infraction under *Terry* and are not tied to the limitations under RCW 46.61.021(2), try not to stray too far from those statutory provisions.

3. Keep in mind that a *Terry* Investigative stop does not provide grounds for, or justify a search of a person, a vehicle or its occupants. You must have evidence that a crime was or is being committed and the search must be done with a warrant or under an exception to the warrant requirement.

iii. Non-traffic infractions:

You may not use a *Terry* stop to investigate solely whether a person committed a non-traffic infraction.

Thus far, we have talked about ways to investigate an offense. You can use an officer-citizen encounter for all crimes and infractions. You can use a *Terry* stop to investigate crimes and traffic infractions that are either committed in your presence or are committed outside your presence that are authorized by the legislature, when you have *reasonable suspicion* to believe the offense has been committed. *Terry* stops cannot be used to investigate traffic offenses not committed in your presence [other than the few exceptions noted above] or to investigate non-traffic offenses.

Now we examine when you may seize the person to charge him with an offense.

**B. Detaining the person to charge him with an offense**

Crimes:

You may exercise your arrest powers after conducting a *Terry* investigative stop, or without using a *Terry* stop, so long as you have *probable cause* to believe the person has committed a crime.

**1. Arrests**

You can “seize” a person without arresting him. A *Terry* stop is a seizure that does not rise to the level of an arrest. An arrest is the taking, seizing or detaining of a person by touching, or by any act which indicates an intention to take him into custody and subject him to the actual control of the person making the arrest, or any deprivation of either liberty of movement or

freedom to remain in the place of his lawful choice by one using physical force, threats, or by conduct.

To lawfully arrest a person, you must have *probable cause* to believe he committed a criminal offense.<sup>2</sup> This does not mean that you must have facts sufficient to establish guilt beyond a reasonable doubt, but you must have reasonable grounds for suspicion, coupled with evidence of circumstances sufficiently strong in themselves, to warrant a cautious and disinterested person in believing that the suspect is guilty of the offense.

Actions that will convert an investigative detention into a custodial arrest:

1. Transporting the suspect to the sheriff's office or interrogation room;

Actions that do not necessarily, but may turn an investigative detention into a custodial arrest:

1. An officer's statement that the suspect is under arrest;
2. Grabbing the suspect's arm or otherwise restraining him by force;
3. Placing the suspect in handcuffs;
4. Asking the driver to exit a car;
5. Use of drawn guns;
6. Transporting a suspect from the scene to a location other than a police station house;
7. The presence of numerous police vehicles;
8. Placing the suspect in the back seat of a patrol car.

Your Bible for your arrest powers is RCW 10.31.100 [along with the limitations placed upon you by the constitution]. Generally, you may arrest a person if you have *probable cause* to believe he has committed (1) a felony; (2) a non-felony committed in your presence; or (3) a non-felony that is not committed in your presence, for which the legislature has given you special arrest authority.

## **2. Discretionary arrests**

You may arrest a person without a warrant if you have *probable cause* to believe he has committed or is committing a misdemeanor or gross misdemeanor, even if not committed in your presence, if the crime involves:

1. Physical harm or threats of harm to any person or property;
2. The unlawful taking of property;
3. The use or possession of cannabis;
4. The acquisition, possession or consumption by a minor;
5. Criminal trespass, RCW 9A.52.070 [first degree] or 9A.52.0870 [second degree].

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<sup>2</sup> A person may not be arrested for a traffic infraction. *State v. McIntosh*, 42 Wn. App. 573 (1986); *State v. LaTourette*, 49 Wn. App. 119 (1987); *State v. Larson*, 88 Wn. App. 849 (1997).

6. Certain driving offenses:
  - a. Hit and Run unattended car or property, RCW 46.52.010;
  - b. Hit and Run relating to duty in case of injury/death or damage to attended vehicle, RCW 46.52.020;
  - c. Reckless driving [RCW 46.61.500] or racing [RCW 46.61.530];
  - d. DUI [RCW 46.61.502] or Physical Control [RCW 46.61.504];
  - e. DWLS/R [RCW 46.20.342];
  - f. Negligent Driving First [RCW 46.61.5249];
  - g. If you are investigating the scene of a motor vehicle accident, you may arrest a driver of a vehicle involved in the accident if you have probable cause to believe he committed a violation of any traffic law or regulation in connection with the accident.
7. Indecent exposure [RCW 9A.88.010];
8. Knowing violation of a civil anti-harassment order [RCW 10.14];
9. Interference with a health care facility within the past 24 hours [RCW 9A.50.020];
10. Illegal possession of a firearm [defined in RCW 9.41.010] or other dangerous weapon [defined in RCW 9.41.250] on school premises.

### 3. Mandatory arrests

You must arrest a person if you have probable cause to believe:

1. Violation of most protection orders: The person has knowingly violated the provisions of a protection orders restraining him from:

Committing acts or threats of violence  
 Going onto the grounds of, or entering a residence, workplace, school, or day care;  
 Coming within or remaining within a specified distance of a location

Where the order was issued pursuant to:

- a. RCW 26.44.063 [orders protecting child victims of sexual or physical abuse];
- b. RCW 7.90 [sexual assault protection orders];
- c. RCW 10.99 [criminal domestic violence no-contact orders];
- d. RCW 26.09 [restraining orders in dissolution proceedings];
- e. RCW 26.10 [restraining orders in non-parental actions for child custody];
- f. RCW 26.26 [restraining orders in paternity actions];
- g. RCW 26.50 [civil domestic violence protection orders];
- h. RCW 74.34 [protection orders for vulnerable adults]

2. Violation of any provision of an order issued under RCW 26.44.063 [orders protecting child victims of sexual or physical abuse].

3. Violation of foreign protection orders: Knowingly violating a provision of the order involving:

Contacting or communication with another person;

Coming or remaining within a specified distance of a location

Any provision that the order specifically indicates that a violation will constitute a crime.

4. Domestic Violence Assaults:

A Person 16 or older who has assaulted family or household members within preceding 4 hours

5. Felonious assault:

a. Assault involving bodily harm [defined as physical pain, illness or impairment of physical condition] – regardless of whether injury is observable;

b. Any physical action that was intended to cause another reasonably to fear imminent serious bodily harm or death.

**NOTE: If you have probable cause to believe family or household members have assaulted each other, you must arrest the primary aggressor**

There is some confusion over the use of the term “arrest”. You can arrest a person for committing a crime as authorized under RCW 10.31.100. As discussed below, you can detain a person to issue a citation for an infraction committed in your presence [and for certain traffic offenses not committed in your presence]. The confusion arises because a detention to issue a citation is technically an “arrest” in the sense that the person cannot walk away. In fact, some statutes use the term “arrest” in the context of writing a citation. Regardless of the term used, you can only briefly detain a person to issue a citation. You cannot conduct a custodial arrest or a search incident to arrest, etc.

**4. Infractions:**

Your third tool: **Detention on Probable Cause**

The general rule is:

An officer, who has *probable cause* to believe that (1) a non-traffic infraction or a traffic offense was committed (2) in his presence<sup>3</sup>, may detain the person receiving the infraction for a reasonable period of time necessary to identify the person and to complete the notice of infraction.

Keep in mind, we are not talking about *Terry* investigative stops. We are talking about the power to stop and detain a person because you have *probable cause* to believe he committed an infraction in your presence [or a traffic infraction included in the exception list that is not committed in your presence].

What statutes set forth these limited powers?

i. Traffic infractions:

*Whenever any person is stopped for a traffic infraction, the officer **may detain that person for a reasonable period of time necessary to [1] identify the person, [2] check for outstanding warrants, [3] check the status of the person's license[], insurance identification card, and the vehicle's registration, and [4] complete and issue a notice of traffic infraction.***

RCW 46.61.021(2)

*Whenever any person is arrested for any violation of the traffic laws or regulations which is punishable as a misdemeanor or by imposition of a fine, the arresting officer may serve upon him or her a traffic citation and notice to appear in court. Such citation and notice shall conform to the requirements of RCW 46.64.010, and in addition, shall include spaces for the name and address of the person arrested, the license number of the vehicle involved, the driver's license number of such person, if any, the offense or violation charged, and the time and place where such person shall appear in court. Such spaces shall be filled with the appropriate information by the arresting officer. An officer may not serve or issue any traffic citation or notice for any offense or violation except either when the offense or violation is committed in his or her presence or when a person may be arrested pursuant to RCW 10.31.100, as now or hereafter amended. **The detention arising from an arrest under this section may not be for a period of time longer than is reasonably necessary to issue and serve a citation and notice, except that the time limitation does not apply under any of the following circumstances:***

*(1) Where the arresting officer has probable cause to believe that the arrested person has committed any of the offenses enumerated in RCW 10.31.100(3);*

*(2) When the arrested person is a nonresident and is being detained for a hearing under RCW 46.64.035.*

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<sup>3</sup> Keep in mind the list of traffic infractions for which you may detain and cite even if they were not committed in your presence under RCW 46.63.030(1)

ii. Non-traffic infractions

Non-traffic infractions are as follows:

*A notice of civil infraction may be issued by an enforcement officer when the civil infraction occurs in the officer's presence.*

RCW 7.80.050(2).

The person receiving the notice of civil infraction is required to identify himself and may be detained for a period of time reasonably necessary identify him to issue the citation:

*A person who is to receive a notice of civil infraction under RCW 7.80.050 is required to identify himself or herself to the enforcement officer by giving his or her name, address, and date of birth. Upon the request of the officer, the person shall produce reasonable identification, including a driver's license or identicard.*

*A person who is unable or unwilling to reasonably identify himself or herself to an enforcement officer may be detained for a period of time not longer than is reasonably necessary to identify the person for purposes of issuing a civil infraction.*

Can you detain a person for the purposes of checking for outstanding arrest warrants?

**Note carefully:** The scope of your power to detain the person stopped for an infraction may extend for an additional period necessary to conduct a warrant check only if the infraction is for a violation of the following titles, or rules and regulations adopted under these titles:

- 7.84 Natural Resources
- 46 Traffic
- 76 Forrest and Forest Products
- 77 Fish and Wildlife
- 79 Public lands
- 79A Public Recreational Lands [which also covers recreational vessel laws, RCW 79A.60]

**[These statutes do not include infractions involving alcohol and marijuana!]**

Of course, if you are conducting an investigation for both crimes and infractions, your power to investigate crimes is broader. The fact that you are also investigating infractions does not limit your powers to investigate the concurrent crimes.

## 5. Who can Issue a Notice of Civil Infraction

### i. Non-traffic infractions:

An officer may issue a notice of civil infraction if it was committed in his presence.

The court may issue a civil infraction if the officer files a written statement that (1) the infraction was committed in his presence, or (2) that he has reasonable cause to believe that a civil infraction was committed. Thus, in any situation, if you file a citation with the court and provide a declaration establishing probable cause to believe the infraction occurred, the court may issue the citation.

### ii. Traffic Infractions:

An officer may issue a notice of traffic infraction:

- (a) When the infraction is committed in the officer's presence;
- (b) When the officer is acting upon the request of a law enforcement officer in whose presence the traffic infraction was committed;
- (c) If an officer investigating at the scene of a motor vehicle accident has reasonable cause to believe that the driver of a motor vehicle involved in the accident has committed a traffic infraction;
- (d) When the infraction is detected through the use of an automated traffic safety camera under RCW 46.63.170; or
- (e) When the infraction is detected through the use of an automated school bus safety camera under RCW 46.63.180.

The court may issue a notice of traffic infraction;

- (a) Upon receipt of a written statement of the officer setting forth facts that establish probable cause to believe the infraction was committed.

## SEARCHES

### A. Crimes

You may search a person pursuant to a warrant. Other exceptions to the warrant rule include:

1. Open view: Evidence or contraband observed without intruding upon a constitutionally protected place does not constitute a “search”. You may only seize an item observed in open view, if you can do so without intruding upon a constitutionally protected area or provided that intrusion upon that constitutionally protected area would come within another exception to the warrant rule;
2. Plain view: The elements of a plain view search are that the officer has lawfully intruded in a constitutionally protected place and, while in such place, observes evidence or contraband inside that protected place; that the item(s) seized were immediately recognized as contraband or as having some evidentiary value; and that the discovery of the incriminating evidence must be inadvertent. [The last element may no longer be required].
3. Consent to search: Consent to search must be voluntary and not coerced and must be given by a person with lawful authority to grant consent over the item or place. The person must affirmatively grant consent and not merely acquiesce to your search.

Search incident to arrest: After you have lawfully arrested a person, you may conduct a search of the person and any area to which he may reasonably obtain access [i.e. within the lunge area].

Emergency doctrine: The need to protect or preserve life, avoid serious injury or protect property in danger of damage justifies an entry that would otherwise be illegal absent an emergency. The officer’s motivation for the entry is the linchpin in the assertion of the emergency doctrine. It is important to remember, however, that while an entry may be justified under the emergency doctrine, a warrant will generally need to be obtained prior to further investigation or seizure of evidence.

The emergency doctrine does not require probable cause but must be motivated by the perceived need to render aid or assistance. Police are acting under their general or community caretaking role in emergency action, not in their evidence gathering role. Washington cases have generally held that for a search or entry to come within the emergency exception, the court must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search and instead was "actually motivated by a perceived need to render aid or assistance." To that end, the State must show that: (1) the searching officer subjectively believed an emergency existed; and (2) a reasonable person in the same circumstances would have thought an emergency existed.

## B. Infractions

Where a person commits a civil infraction in your presence, can you search for evidence?  
*Nowles*<sup>4</sup>

*As discussed above, where a driver is detained to allow the officer to write a citation for an infraction, the permissible scope and duration of the detention is limited. The officer may check the person's identification, license, registration, insurance, and conduct a warrants check. The car may not be searched or the driver frisked, unless there is concern for criminal activity or officer safety beyond the original traffic infraction.*

What if the person is a minor smoking a cigarette, or an adult holding an open container of alcohol, or an adult opening a package with a small amount of marijuana in view of the general public?<sup>5</sup>

The first question, is whether the item is contraband. It would appear that the cigarette is contraband because the minor cannot lawfully possess it. I would argue that under your community caretaking function you could seize the cigarette if it is in open view or, better yet, you can ask him to give you the cigarette and you can seize it. This would be especially true if he continued to smoke the cigarette in your presence. However, there is case law in Maryland to the contrary, holding that since possession of cigarettes by minors is merely an infraction, and because the legislature did not declare cigarettes "contraband", you cannot search for or seize cigarettes. Best procedure: politely ask the minor for the cigarette and others he may have on him, but don't search for cigarettes or use force to seize them.

Alcohol or marijuana in the possession of an adult is not contraband – it can be legally possessed by him, but just not in public. I think you can politely ask the person to turn over the items. Otherwise, I don't think you can search for or seize the alcohol or marijuana unless the person refuses to put the item away – in which case you seize the item under your community

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<sup>4</sup> *Knowles v. Iowa*, 525 U.S. 113 (1998) held that an officer who stopped a car for a traffic infraction and issued a citation could not search the driver and car. The rationale for a search incident to arrest does not extend to 'searches incident to citations': (1) a detention for an infraction is like a brief *Terry* stop, which does not, in itself, authorize or justify a search; (2) where a person is stopped for an infraction and is identified, usually all evidence necessary to prosecute the infraction has been obtained and there is no risk of the person destroying evidence. See *People v. Troiano*, 35 N.Y. 2d 476, 323, N.E. 183, 363 N.Y.S. 2d 943 (1974) and *People v. Marsh*, 20 N.Y.2d 98, 228 N.E.2d 783 (1967): People may not be searched incident to detention for an infraction. *Barnett v. U.S.* 525 A.2d 197 (D.C. 1987): an officer may not arrest a person for violating a civil infraction or conduct a search incident to what would therefore constitute an unlawful arrest. *Accord: Welch v. State*, 741 So.2d 1268 (Fla. App. 1999) *State v. McIntosh*, 42 Wn.App. 573 (1986) and *State v. LaTourette*, 49 Wn. App. 119 (1987): A person may not be arrested for a traffic infraction.

<sup>5</sup> *In re Calvin S.*, 175 Md. App. 516, 930 A.2d 1099 (2007), Officers contacted a minor riding a bicycle without a headlamp on the wrong side of the street while smoking a cigarette. All these actions were infractions. Officers frisked the minor for other cigarettes on his person. The court held that since these were infractions, not crimes, there was no justification for a 'search incident to citation'. The court also held that under Maryland law, cigarettes were not "contraband" even when possessed by minors – so officers could not search for cigarettes on the grounds that they were "contraband".

caretaking function to preserve the health and welfare of the public. Prosecutors will be discussing this further and I will update you if there is a different consensus.

	Encounter	Terry Stop	Search	Detention to Issue citation	Arrest
Crime	Yes	Yes	Yes	Yes	Yes if RCW 10.31.100 applies
Traffic Infraction [in your presence or exceptions apply]	Yes	Yes	No	Yes	No
Traffic Infraction [not in your presence]	Yes	Yes	No	No	No
Non-traffic infraction [in your presence]	Yes	No	No	Yes	No
Non-traffic infraction [not in your presence]	Yes	No	No	No	No

## The New Marijuana Law

This discussion of the new marijuana law does not include the manufacture, sale, distribution, and delivery of marijuana. It is still illegal for anyone to engage in any of these activities until the Liquor Control Board adopts rules and regulations.

### A. Definitions:

To be considered “marijuana” the plant must have a threshold THC concentration of 0.3 dry weight:

*"Marijuana" or "marihuana" means all parts of the plant Cannabis, whether growing or not, with a THC concentration greater than 0.3 percent on a dry weight basis; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.*

Since THC concentration is a factor in determining whether a plant is marijuana, the law tells us what it is that we are measuring – “active THC”:

*"THC concentration" means percent of delta-9 tetrahydrocannabinol content per dry weight of any part of the plant Cannabis, or per volume or weight of marijuana product.*

Note that the definition of “THC concentration” for the purposes of the DUI law is slightly different, since it is only the active THC that is relevant:

*"THC concentration" means nanograms of delta-9 tetrahydrocannabinol per milliliter of a person's whole blood. THC concentration does not include measurement of the metabolite THC-COOH, also known as carboxy-THC.*

Because the new law sets limits for possession of both useable marijuana and marijuana products – i.e. products infused with marijuana, these are defined:

*"Marijuana-infused products" means products that contain marijuana or marijuana extracts and are intended for human use. The term "marijuana-infused products" does not include useable marijuana.*

*"Useable marijuana" means dried marijuana flowers. The term "useable marijuana" does not include marijuana-infused products.*

**B.        Possession of marijuana:**

Medical marijuana: The medical marijuana law is still valid and unchanged.

The new law: It is still generally illegal and a criminal offense to possess marijuana, however, the new law has carved out an exception to the general rule:

It is not unlawful for a person who is at least 21 years of age to possess:

1. One ounce of useable marijuana [this is equivalent to the weight of 5 quarters or about 6 nickels];
2. Sixteen ounces of marijuana-infused product in solid form; or
3. Seventy-two ounces of marijuana-infused product in liquid form.

Notice limitations on the age of the person and the weight for each type or form of marijuana.

A violation of this law is a misdemeanor.

Citation remains the same: RCS 69.50.4014

**C.        Open container/Use in public view:**

*It is a class 3 civil infraction for a person to open a package containing marijuana, useable marijuana, or a marijuana-infused product, or consume marijuana, useable marijuana, or a marijuana-infused product, in view of the general public.*

Note that this prohibition includes both useable marijuana and infused products

It prohibits opening and consuming the product “in view of the general public”. This means that you should not see or smell marijuana when you are patrolling the streets, sidewalks and other public places, or in a private place that is open to the general public, such as a store.

The phrase “in view of the general public” is a bit tricky. What if my apartment is on Main Street and I smoke dope in my front window where passers-by can see me? What if it is 3:00 a.m. on Beaverton Valley Road?

I would suggest you apply the term “in view of the general public” to mean (1) committed in a place open to the general public, or (2) done in a non-public place but in view of the general public.

Until the new law has been codified, cite the infraction as: Initiative measure No. 502 section 21.

Penalty: \$103.

**D.        Use of drug paraphernalia:**

The “use of drug paraphernalia” statute no longer applies to any paraphernalia used or intended to be used for marijuana. So it is not a crime to use bongs, cigarette paper, pipes, etc. for packaging, smoking, or ingesting marijuana. The law still applies to paraphernalia used for other drugs.

**E.        DUI/PC and Minor DUI/PC cases:**

For persons driving or in physical control of a vehicle, there is now *a per-se level of 5 ng/ml of active THC*

For persons under 21 years driving or in physical control of a vehicle, *ANY concentration of THC is prohibited*. [You read that correctly – zero tolerance for any active THC in the body of a minor driving or in physical control of a vehicle].

**F.        Testing:**

There will be new implied consent warnings because of the new per-se 5 ng/ml THC threshold in DUI/PC [5 ng/ml] and for the new tolerance threshold in Minor Driving after Drinking/Using cases.

The basic law has not changed: the test administered will be BREATH, unless

1. You have reasonable grounds to believe the person is under the influence of a drug; or
2. The person is incapable of providing a breath sample because he has a physical limitation, or he is being provided treatment at a medical facility, ambulance, etc.; or
3. He is unconscious; or
4. He is under arrest for vehicular homicide or vehicular assault; or
5. He is under arrest for DUI resulting from an accident in which there has been serious bodily injury to another.

**Of course, you may always obtain a search warrant.**

We will update our DUI/PC search warrant – but keep in mind that nothing really has changed with regard to what you need to get a search warrant.

**G.        Conclusion:**

Initiative 502 will require us to rethink the way we handle marijuana offenses. In general, marijuana offenses are similar to alcohol offenses.